

**RPM Beef, Inc. and Butchers Union Local No. 126,  
United Food and Commercial Workers, AFL-  
CIO. Case 32-CA-3847**

December 21, 1981

**DECISION AND ORDER**

**BY MEMBERS FANNING, JENKINS, AND  
ZIMMERMAN**

Upon a charge filed on August 10, 1981, by Butchers Union Local No. 126, United Food and Commercial Workers, AFL-CIO, herein called the Union, and duly served on RPM Beef, Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 32, issued a complaint on September 2, 1981, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on July 14, 1981, following a Board election in Case 32-RC-1211, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;<sup>1</sup> and that, commencing on or about July 20, 1981, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so.<sup>2</sup> On September 16, 1981, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On October 6, 1981, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on October 8, 1981, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent

thereafter filed a response to the Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

**Ruling on the Motion for Summary Judgment**

In its answer to the complaint and response to the Notice To Show Cause, Respondent contends that the Board erroneously issued a Certification of Representative for the Union because it improperly overruled Respondent's objections to the election. The General Counsel argues that all material issues have been previously decided in the related representation proceeding. We agree with the General Counsel.

Review of the record herein, including the record in Case 32-RC-1211, reveals that on December 3, 1980, the Regional Director for Region 32 approved a Stipulation for Certification Upon Consent Election agreed to by the Union and Respondent. An election was conducted on December 23, 1980, which resulted in a vote of 11 for, and 4 against, the Union. There were four challenged ballots, a number insufficient to affect the results of the election. On December 29, 1980, Respondent filed objections to conduct affecting the results of the election. On January 21, 1981, the Regional Director issued and served on the parties his Report on Objections, Order, and Notice of Hearing, in which he directed a hearing on Respondent's Objections 1, 2, 5, 19, and 20. At the hearing, conducted on February 11, 1981, Respondent alleged that the Union made material misrepresentations to the employees regarding the Employer's profitability, the compensation received by the owners of the Employer, and benefits and wages provided at union plants. Respondent also alleged that the Union made unlawful promises of wages and benefits in return for favorable votes. Both independently and cumulatively these acts were claimed to have destroyed the "laboratory conditions" required for the election.

In her Report on Objections and an Amendment to Report on Objections, issued on April 2 and April 7, 1981, the Hearing Officer found that no material misrepresentations or unlawful promises were made, and therefore recommended that Respondent's Objections 1, 2, 5, 19, and 20 be overruled in their entirety. On April 9, 1981, Respondent filed with the Board exceptions to the Hearing Officer's Report on Objections. On July 14, 1981, the National Labor Relations Board issued its De-

<sup>1</sup> Official notice is taken of the record in the representation proceeding, Case 32-RC-1211, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enf'd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enf'd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enf'd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

<sup>2</sup> By letter dated August 26, 1981, Respondent confirmed to an agent of the Regional Director that it was engaging in a "technical refusal to bargain" with the Union.

cision and Certification of Representative, in which it adopted the Hearing Officer's recommended disposition of Respondent's Objections 1, 2, 5, 19, and 20 and certified the Union as the exclusive collective-bargaining representative of the employees of Respondent in the unit described in the stipulation.

In its response to the Notice To Show Cause, Respondent alleges as the basis to deny the General Counsel's Motion for Summary Judgment the same union conduct it raised in its objections to the election and its exceptions to the Hearing Officer's report. It thus appears that Respondent is attempting to raise herein issues which were raised and determined in the underlying representation case.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.<sup>3</sup>

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

#### FINDINGS OF FACT

##### I. THE BUSINESS OF RESPONDENT

Respondent is a California corporation, with an office and place of business in Fresno, California, engaged in the retail and nonretail sales of meat products. During the past 12 months Respondent, in the course and conduct of its business operations, purchased and received goods and services valued in excess of \$50,000 directly from suppliers located outside the State of California, and derived gross revenues in excess of \$500,000.<sup>4</sup>

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and

that it will effectuate the policies of the Act to assert jurisdiction herein.

##### II. THE LABOR ORGANIZATION INVOLVED

Butchers Union Local No. 126, United Food and Commercial Workers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

##### III. THE UNFAIR LABOR PRACTICES

###### A. *The Representation Proceeding*

###### 1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

All full-time and regular part-time butchers, wrapping employees, shipping and receiving employees, and drivers employed by the Employer at its 2413 S. Fruit Street, Fresno, California, location; excluding all office clerical employees, sales employees, guards and supervisors as defined in the Act.

###### 2. The certification

On December 23, 1980, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 32, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on July 14, 1981, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

###### B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about July 20, 1981, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about July 20, 1981, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since July 20, 1981, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appro-

<sup>3</sup> See *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

<sup>4</sup> In its answer to the complaint and response to the Notice To Show Cause, Respondent denied that it is engaged in the retail sale of meat. In the Stipulation for Certification Upon Consent Election, however, Respondent agreed that it did engage in retail sales. In any event, Respondent does not contest the Board's jurisdiction.

priate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

#### IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of RPM Beef, Inc., set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

#### V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.<sup>5</sup>

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

#### CONCLUSIONS OF LAW

1. RPM Beef, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. Butchers Union Local No. 126, United Food and Commercial Workers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.
3. All full-time and regular part-time butchers, wrapping employees, shipping and receiving em-

ployees, and drivers employed by the Employer at its 2413 S. Fruit Street, Fresno, California, location; excluding all office clerical employees, sales employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since July 14, 1981, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about July 20, 1981, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

#### ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, RPM Beef, Inc., Fresno, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:
  - (a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Butchers Union Local No. 126, United Food and Commercial Workers, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

All full-time and regular part-time butchers, wrapping employees, shipping and receiving employees, and drivers employed by the Employer at its 2413 S. Fruit Street, Fresno, California, location; excluding all office clerical employees, sales employees, guards and supervisors as defined in the Act.

- (b) In any like or related manner interfering with, restraining, or coercing employees in the ex-

<sup>5</sup> In its Joinder in Motion for Summary Judgment, the Charging Party requests that attorney's fees be awarded to it. That request is denied. See *Trustees of Boston University*, 228 NLRB 1008, 1010 (1977), enfd. 575 F.2d 301 (1st Cir. 1978).

ercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its 2413 S. Fruit Street, Fresno, California, facility copies of the attached notice marked "Appendix."<sup>6</sup> Copies of said notice, on forms provided by the Regional Director for Region 32, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 32, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

<sup>6</sup> In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Butchers Union Local No. 126, United Food and Commercial Workers, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All full-time and regular part-time butchers, wrapping employees, shipping and receiving employees, and drivers employed by the Employer at its 2413 S. Fruit Street, Fresno, California, location; excluding all office clerical employees, sales employees, guards and supervisors as defined in the Act.

RPM BEEF, INC.